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# Supreme Court of the United States

**OCTOBER TERM, 1952**

**No. 111**

JULIUS ROSENBERG and ETHEL ROSENBERG,
*Petitioners,*

v.

UNITED STATES OF AMERICA.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION OF NATIONAL LAWYERS GUILD FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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*To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The National Lawyers Guild respectfully moves this Court pursuant to Rule 27, paragraph 9(C), of the Rules of this Court, for leave to file a brief in this case as *amicus curiae*.*

The National Lawyers Guild is a bar association of national membership which is and has long been dedicated to the aim, among others, of helping to defend constitutional rights and liberties.

*Consent of the parties has not been sought since we have been advised of the standing rule of the Solicitor General not to consent to such applications since the adoption of the Amended Rule 27.

Because it believes that this case raises novel and important issues as to the scope of constitutional protection and as to the powers and jurisdiction of the Federal Appellate Courts which should be reviewed by this Court, and which have not been discussed or have not been adequately discussed by petitioners, it seeks leave to present its views in the belief that by so doing it may assist this Court.

The precise issues raised herein which we seek leave to argue more fully as *amicus curiae* are these:

1. Whether Sections 32(a) and 34 of Title 50, United States Code (now Title 18, United States Code, Section 794) as applied and construed in this case do not constitute an unconstitutional extension of the constitutional definition of treason (Article III Sec. 3). Petitioners rely, in arguing a closely related point, primarily on conduct of the prosecutor and trial judge. As indicated below we see the issue in a different light.

2. Whether this Court has the power to modify the death sentence meted out to petitioners Rosenberg, and whether, under the circumstances of this case, this sentence should be modified. The Petitioners do not discuss this point in their petition for certiorari.

**Brief Statement of Argument Intended to be Made**

1. The Rosenbergs were indicted and tried under the Espionage Act for allegedly giving aid by transmitting information relating to the "national defense" to a foreign country concededly not an enemy of the United States. It was not charged that the information allegedly transmitted was transmitted with intent to harm the United States. Proof of political connection with a then friendly foreign power was accepted on the basis of testimony tending to show a propensity for adherence to the said foreign power.

Article III Section 3 of the Constitution provides:

> "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

The purpose of this restrictive definition is clear. As was stated by this Court in *Cramer* v. *United States*, 325 U. S. 1, 65 S. Ct. 918,

> "The temper and attitude of the Convention toward treason prosecutions is unmistakable. It adopted every limitation that the practice of governments had evolved or that politico-legal philosophy to that time had advanced. * * * The framers combined all of these known protections and added two of their own which had no precedent. *They wrote into the organic act of the new government a prohibition of legislative or judicial creations of new treasons* * * *." (Emphasis supplied.)

The history of English law was replete with the attempts by judicial innovation of "constructive treason" to circumvent limitations placed upon treason prosecutions to punish political heresy.

> "Nothing had brought so much disgrace on the councils of government, and on the administration of justice, nothing more forcibly spoken the necessity of a great change, than the prosecutions for treason during the latter years of Charles II, and in truth during the whole course of our legal history. The statutes of Edward III and Edward VI, almost set aside by sophistical constructions, required the corroboration of some more explicit law; and some peculiar securities were demanded for innocence against that conspiracy of the court with the prosecutor, which is so much to be dreaded in all trials for political crimes." 2 Hallam, Constitutional History of England (1827) P. 509 (cited in *Cramer* v. *U. S.* 65 S. Ct. at p. 932).

The Treason clause of the Constitution, based upon a report by the Convention Committee on Spies, is much more restrictive than the English Treason Act (25 Edw. III Stat. 5, Chap. 2) because it was

> "framed by men who, as we have seen, were taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself" (*Cramer Case*, supra, P. 928).

The fact that the Treason clause was drafted by the Committee on Spies may well indicate that espionage was considered as falling within the scope of the Treason clause. The Constitutional Convention

> "adopted every limitation that the practice of governments had evolved or that political legal philosophy to that time had advanced" (*Cramer Case*, supra, P. 929).

If the charge here had been that the Rosenbergs had transmitted information "to the advantage of" an enemy of the United States, the prosecution certainly couldn't get around the two witness rule. As stated in the *Cramer Case*,

> "Of course, we do not intimate that Congress could dispense with the two witness rule merely by giving the same offense another name" (pp. 939, 940).

In the instant case, the two witness rule was not observed. The basis of the charge was "advantage to a foreign power" and that power *not* an enemy of the United States. To put the petitioners in a worse position with regard to safeguards against injustice than a person accused of the treason of giving aid to an enemy of our country seems untenable in the light of the clear intent of Article III, Section 3.

Rufus King, one of the members of the Constitutional Convention, in commenting on a proposed treason law introduced in Congress by Senator Giles as an answer to the Burr decision, wrote:

"The limitation which the Constitution establishes on the subject of Treason, proceeded from a principle, which will readily be approved by every man who is acquainted with the vindictive spirit that, at different times in the History of England, has animated the ascendant faction against their political adversaries. If the proposed law on the subject of Treason neither enlarges nor lessens its Constitutional definition, the law is unnecessary; *if it does the one or the other, it is unconstitutional* * * *." Quoted in Hurst, "Treason in the United States" 58 Harvard Law Review 415 (1945). (Emphasis supplied.)

This becomes particularly important in this case because the "evidence" of intent to give aid and comfort was grounded on the political convictions of the Rosenbergs. The trial judge's remarks on sentencing the Petitioners makes it entirely clear that the existence of extreme international tension was a large factor influencing at least the magnitude of the sentences administered. The record discloses that though the government indicted under the Espionage Act, it proceeded to try the defendants as for treason. And this in a highly surcharged atmosphere of "political heresy" and vindictiveness. Under these circumstances it seems appropriate to describe the prosecution as one for "constructive treason".

The essence of the point intended to be made here is that to the extent that the statute is applicable or is attempted to be applied to the case of alleged aid to a foreign power in relation to matters concerning the "national defense" a crime is involved which so closely approximates the charge of treason that all of the factors and considerations which caused the founders to include safeguards in Article III, Section 3 against unjust prosecutions apply to it with equal or even greater force.

Surely it could make no difference to a victim of injustice if he receive a death sentence for aiding a foreign power, not an enemy, or a foreign power which is an enemy. And it seems obvious that a statute applicable to aid to any foreign power in war time or in peace time, even an ally, in

time of war as in the instant case, is adopted to greater abuse than a statute applicable only to aid given an enemy in time of war.

It is not surprising that the trial took on the atmosphere of a treason trial, and that the defendants were referred to as "Traitors" because such a statute is inherently conducive to such an outcome.

The Court of Appeals, in rejecting a similar contention on rehearing, relied on *Ex Parte Quirin*, 317 U. S. 1, stating:

> "In the *Quirin* case, the absence of uniform was an additional element, essential to Haupt's non-treason offense although irrelevant to his treason; in the *Rosenbergs'* case, an essential element of treason, giving aid to an 'enemy' is irrelevant to the espionage offense."

It is submitted that this reasoning begs the question. The *Quirin* case involved not only a trial under the Articles of War, but involved a crime that required a distinctly different and *greater* measure of proof. In the *Quirin* case it was necessary to establish that the defendants had the status of enemy belligerents, that they passed and went beyond our lines, without uniform. These are all elements of proof in addition to those required by the Treason Article. In the instant case the crime charged involved a lesser measure of proof in that it was unnecessary to show that the foreign power aided was an enemy.

Moreover, from time immemorial, enemy belligerents have been tried under the Articles of War. The fact that certain of the enemy belligerents were citizens of the United States would not give them immunity from prosecution as such belligerents.

It is submitted that the interests of justice, and a fair interpretation of the intent of Article III, Section 3, require that upon any such prosecution under a statute which defines a crime so similar to treason and so adapted to abuse, a measure of proof equal to that prescribed by Article III, Section 3, shall be required. Since the trial

did not give the instructions constitutionally required
reason trial, reversible error was committed.

We do not discuss the proposition that the punish-
meted out here is in violation of the Eighth Amend-
prohibiting "cruel and unusual punishments". This
cussed adequately in petitioners' brief.

raise the question here of this Court's power to mod-
is sentence of death, under Title 28 United States
Section 2106, because of the compelling reasons here
odification of the sentences of death.

tion 2106 of Title 28 provides:

"The Supreme Court or any other court of appellate
urisdiction may affirm, modify, vacate, set aside or
everse any judgment, decree, or order of a court law-
ully brought before it for review, and may remand
he cause and direct the entry of such appropriate
udgment, decree or order, or require such further pro-
eedings to be had as may be just under the circum-
tances."

Court of Appeals, in affirming the conviction herein,
l the power to exercise such jurisdiction, stating:

"Unless we are to over-rule sixty years of undeviat-
ng federal precedents, we must hold that an appellate
ourt has no power to modify a sentence" (Frank, J.,
95 F. 2nd at page 604).

lge Frank, for himself, then discusses the various de-
s in light of Section 2106 (at pp. 605, et seq.). He
:

"No decision by the Supreme Court or any federal
ourt of appeals seems to have cited or considered this
tatute in passing on the question of the power to re-
uce a sentence when a conviction is affirmed."

lge Frank points out the similarity in wording of Sec-
2106 and of various state statutes wherein state ap-
e courts have found authority for modification, and
footnote (30) states:

> "Where an upper court has such power, the criterion used to determine whether a sentence is too harsh would seem to be that court's own judgment—not the 'common conscience'.
>
> "It has been held that, in such circumstances, the upper court may consider, for such purposes, the quality of the evidence on which the verdict rests. See Fritz v. State, 8 Okl. Cr. 342, 128 P. 170. So here, had this court such power, it might take into consideration the fact that the evidence of the Rosenbergs' activities after Germany's defeat (as well as of their earlier espionage activities) came almost entirely from accomplices."

We could not point out more strongly than does Judge Frank that the question of the appellate court's power to modify sentences, under Section 2106 of Title 18 is "res nova". In light of the discussion by Judge Frank, and his indication that he might have favored a reduced sentence were this authorized, this is a serious question of right that should be examined and decided by this Court. If the Federal appellate courts have the power to modify the sentence in this case, then certainly the defendants should be accorded that review.

This is especially true in light of this Court's statement that:

> "In the century and a half of our national existence not one execution on a federal treason conviction has taken place." (*Cramer Case*, supra, p. 930.)

This has also proved true of all treason and espionage trials since the *Cramer* case was decided.

It is respectfully submitted that, in light of the grave questions stated above, this Court should grant the motion for leave to file an *amicus curiae* brief herein, and grant certiorari to the petitioners herein.

Respectfully submitted,

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